

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General
BRYAN L. STOCKTON
Senior Deputy Attorney General
Nevada State Bar # 4764
100 N. Carson Street
Carson City, Nevada 89701
775-684-1228 Telephone
775-684-1108 Facsimile
bstockton@ag.nv.gov
Attorneys for Nevada
Department of Wildlife

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

WALKER RIVER PAIUTE TRIBE,

Plaintiff-Intervenor,

vs.

WALKER RIVER IRRIGATION DISTRICT,
a corporation, et al.,

Defendants,

MINERAL COUNTY,

Plaintiff-Intervenor,

vs.

WALKER RIVER IRRIGATION DISTRICT,
a corporation, et. al.,

Defendants.

IN EQUITY NO. C-125-RCJ
Subproceedings: C-125-B & C-125-C
CASE NO: 3:73-CV-00127

**REPLY IN SUPPORT OF MOTION TO
DISMISS CONCERNING THRESHOLD
JURISDICTIONAL ISSUES**

///

Respectfully submitted this 30th day of June, 2014.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Bryan L. Stockton
BRYAN L. STOCKTON
Senior Deputy Attorney General
Nevada State Bar #4764
100 N. Carson Street
Carson City, Nevada 89701
775-684-1228 Telephone
775-684-1103 Facsimile
bstockton@ag.nv.gov
*Attorneys for Nevada Department
of Wildlife*

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES CITED	ii
MEMORANDUM OF POINTS & AUTHORITIES	1
I. POINTS IN REPLY.....	2
II. INTRODUCTION.....	2
III. ARGUMENT.....	2
A. State Court Jurisdiction Over Groundwater Creates a Presumption Against Federal Court Jurisdiction Over Groundwater Claimants.....	2
B. Mineral County’s Characterization of the Public Trust Values Is Oversimplified	5
IV. CONCLUSION	6
CERTIFICATE OF SERVICE.....	8

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

TABLE OF CASES AND AUTHORITIES CITED

Cases

<i>Cappaert v. U. S.</i> , 426 U.S. 128, 141, (1976).....	3
<i>Danforth v. Minnesota</i> , 552 U.S. 264, 291–92, (2008).....	6
<i>Desert Irrigation, Ltd. v. State Engineer</i> , 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997)	5
<i>Griffin v. Westergard</i> , 96 Nev. 627, 615 P.2d 235 (1980)	3
<i>Lawrence v. Clark Cnty.</i> , 127 Nev. Adv. Op. 32, 254 P.3d 606, 615 (2011)	5
<i>Mineral Cnty. v. Dep't of Conservation & Natural Res.</i> , 117 Nev. 235, 20 P.3d 800 (2001)	6
<i>Nat'l Audubon Soc'y v. Superior Court</i> , 658 P.2d 709, 728 (Cal. 1983).....	6
<i>State Engineer v. S. Fork Band of Te-Moak Tribe</i> , 339 F.3d 804, 809 (9th Cir. 2003)	3
<i>United States v. Alpine Land & Reservoir Co.</i> , 174 F.3d 1007, 1014 (9th Cir. 1999)	2
<i>United States v. Cappaert</i> , 455 F. Supp. 81 (D. Nev. 1978)	3
<i>United States v. Orr Water Ditch Co.</i> , 600 F.3d at 1152, 1160 (9th Cir. 2010)	4

Statutes

NRS 533.450 (1).....	6
NRS Chapter 534.....	3

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General
BRYAN L. STOCKTON
Senior Deputy Attorney General
Nevada State Bar # 4764
100 N. Carson Street
Carson City, Nevada 89701
775-684-1228 Telephone
775-684-1108 Facsimile
bstockton@ag.nv.gov
Attorneys for Nevada
Department of Wildlife

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

WALKER RIVER PAIUTE TRIBE,

Plaintiff-Intervenor,

vs.

WALKER RIVER IRRIGATION DISTRICT,
a corporation, et al.,

Defendants,

MINERAL COUNTY,

Plaintiff-Intervenor,

vs.

WALKER RIVER IRRIGATION DISTRICT,
a corporation, et. al.,

Defendants.

IN EQUITY NO. C-125-RCJ
Subproceedings: C-125-B & C-125-C
CASE NO: 3:73-CV-00127

MEMORANDUM OF POINTS & AUTHORITIES

The State of Nevada, through the Nevada Department of Wildlife (NDOW), hereby
replies to the Walker River Paiute Tribe's (WRPT's) Response In Opposition to Motions to

Dismiss filed by the Walker River Irrigation District, NDOW and Circle Bar N Ranch (Opposition) (Doc. 2004-1) and the United States' Response to Motion to Dismiss (Doc. 2022).

NDOW also replies to and opposes Mineral County's characterization of the public trust values of the Walker River Watershed in its Response to Motions to Dismiss Concerning Threshold Jurisdictional Issues (Doc. 2005).

I. POINTS IN REPLY

1. There is a presumption against federal court jurisdiction over groundwater.

2. Issues concerning the extent and application of the public trust doctrine over water in Nevada are far from clear.

II. INTRODUCTION

NDOW's Motion to Dismiss was limited to the issue of jurisdiction over groundwater users in the sub-basins outside the reservation. However, NDOW has an interest in all public trust values related to the Walker River. Distilled to its essence, Mineral County's Response is actually a countermotion asking this Court to declare Walker Lake the one feature of the Walker River Basin worthy of protection under the public trust doctrine. Despite Mineral County's arguments, however, the system is more complex and multi-faceted than represented and there are likely other features in the Basin equally worthy of protection under the public trust doctrine.

III. ARGUMENT

A. State Court Jurisdiction Over Groundwater Creates a Presumption Against Federal Court Jurisdiction Over Groundwater Claimants

The Tribe asserts that there is no presumption against federal court jurisdiction over groundwater. Tribe at 18. It is axiomatic that the first court to take jurisdiction over water rights retains that jurisdiction. *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1014 (9th Cir. 1999) ("The Nevada state court could not have exercised in rem jurisdiction first because the federal district court had already asserted jurisdiction over the water rights in question when it adjudicated the Alpine and Orr Ditch Decrees and because it continued to

1 retain such jurisdiction.”); *State Engineer v. S. Fork Band of Te-Moak Tribe*, 339 F.3d 804,
2 809 (9th Cir. 2003) (“The most obvious jurisdictional hurdle is the ‘ancient and oft-repeated ...
3 doctrine of prior exclusive jurisdiction—that when a court of competent jurisdiction has
4 obtained possession, custody, or control of particular property, that possession may not be
5 disturbed by any other court.”). The State Engineer and state courts of Nevada have had
6 jurisdiction over the administration over groundwater since the enactment of the groundwater
7 statutes in 1939. See generally, NRS Chapter 534. Nevada courts have asserted jurisdiction
8 over groundwater users in the hydrographic basins in the Nevada portion of the Walker River
9 watershed. See, *Griffin v. Westergard*, 96 Nev. 627, 615 P.2d 235 (1980) (Groundwater
10 application in Smith Valley Artesian Basin denied by the State Engineer as it could interfere
11 with decree rights.).

12 The United States and the Tribe both rely on *Cappaert v. U. S.*, 426 U.S. 128, 141,
13 (1976); to oppose NDOW’s Motion to Dismiss. However, *Cappaert* supports perfectly
14 NDOW’s Motion. The court in *Cappaert* enjoined pumping on certain wells that had been
15 shown to have a direct and substantial impact on Devil’s Hole. *United States v. Cappaert*, 455
16 F. Supp. 81 (D. Nev. 1978). In this case, the United States and the Tribe have not alleged
17 that any specific wells have a direct and substantial impact on their decreed water rights. If
18 the United States produces evidence that certain wells are having a direct and substantial
19 impact on the Tribe’s decreed water right, then an action against the owner of that specific
20 well can conceivably be maintained in the Decree Court. Without a prima facie showing of
21 such specific conflicts, however, there is no legal basis for the inclusion of groundwater users
22 in this action, and the claims against them must be dismissed

23 The court in *Cappaert* also held that the water level in Devil’s Hole must not drop below
24 2.7 feet below a designated reference point. *Id.* The court then left the management of the
25 remainder of the resource to the State Engineer and state courts to manage groundwater
26 pumping in the Amargosa Desert Hydrographic Basin. *Cappaert*, 426 U.S. at 141. (“The
27 District Court thus tailored its injunction, very appropriately, to minimal need, curtailing
28

pumping only to the extent necessary to preserve an adequate water level at Devil's Hole, thus implementing the stated objectives of the Proclamation.”).

This Court has jurisdiction only to determine whether the State “Engineer's allocation of groundwater rights adversely affects the Tribe's rights under the Decree. . . .” *United States v. Orr Water Ditch Co.*, 600 F.3d at 1152, 1160 (9th Cir. 2010). The Ninth Circuit further directed that:

If the court concludes that the allocation will have an adverse effect on the Tribe's decreed rights, it will instruct the [State] Engineer to reduce the amount of allocated groundwater rights by an amount necessary to eliminate that effect.

Id. These cases create a clear presumption that this Court lacks primary jurisdiction over groundwater users, but instead may exercise only the limited jurisdiction to determine whether specific groundwater use interferes with decreed water rights. *Id.*

A simple example may show the blatant error in the arguments being advanced by the Tribe and the United States. Hypothetically, using round numbers to illustrate this point, the hypothetical Court hears evidence of the impact of groundwater pumping on decreed water rights and finds that pumping in excess of 2,000 acre-feet annually will impact the decreed rights. In this example, there are 5 groundwater right holders, each of which has a groundwater right for 500 acre-feet annually with the following priority dates:

Black: 1859

Green: 1865

Red: 1890

Orange: 1900

Blue 1905

Under the theories presented by the Tribe, the court would issue an injunction against Blue rescinding their groundwater rights. However, under the current law argued by NDOW herein, the Court would order the State Engineer to keep groundwater pumping below 2,000 acre-feet annually. Blue would maintain the water right, but could not pump if the senior rights were being fully utilized. However, in those years when pumping by the four senior rights was

///

1 less than 2,000 acre-feet annually, the State Engineer could allow Blue to pump the
2 difference, as long as total pumping did not exceed the 2,000 acre-feet annually.

3 The State Engineer and the Nevada courts should continue to manage the
4 groundwater in the basins to avoid interference with decree water rights. Therefore, the
5 United States' and the Tribe's claims against individual groundwater users must be dismissed.

6 B. Mineral County's Characterization of the Public Trust Values Is Oversimplified

7 Mineral County goes too far in its argument that the public trust doctrine in Nevada is
8 settled. The nature and extent of the Public Trust is a matter of state law. See, *Lawrence v.*
9 *Clark Cnty.*, 127 Nev. Adv. Op. 32, 254 P.3d 606, 615 (2011) (citation omitted.) ("Resolution of
10 disputes over title to public trust land is a matter of state law.").

11 The public trust in this case is far more complex than Mineral County would lead this
12 Court to believe. Upstream environmental public trust values include riparian wildlife habitat,
13 in-stream fish habitat and the public trust values supported within the Mason Valley Wildlife
14 Management Area (MVWMA). All of these are important resources deserving of protection
15 under the public trust doctrine. The NDOW-managed fish hatchery at MVWMA has
16 historically provided fish for the fishery at Walker Lake. MVWMA provides significant
17 waterfowl habitat, an important public trust value in itself, which is clearly dependent upon
18 both Walker River water as well as groundwater.

19 The supremacy of the public trust values over all other water rights is also not as clear
20 as Mineral County would lead this court to believe. The beneficial use of water by the people
21 of Nevada is essential to life. The Nevada Supreme Court has ruled, "The concept of
22 beneficial use is singularly the most important public policy underlying the water laws of
23 Nevada and many of the western states." *Desert Irrigation, Ltd. v. State Engineer*, 113 Nev.
24 1049, 1059, 944 P.2d 835, 842 (1997). The Nevada Supreme Court must decide how the
25 balance between these interests must be applied.

26 ///

27 ///

28 ///

1 Mineral County's prior lawsuit was procedurally flawed, and the Nevada Supreme Court
2 properly dismissed it. *Mineral Cnty. v. Dep't of Conservation & Natural Res.*, 117 Nev. 235,
3 20 P.3d 800 (2001). This Court has jurisdiction over the water rights established by the
4 Walker River Decree. NRS 533.450 (1) (" . . . on stream systems where a decree of court has
5 been entered, the action must be initiated in the court that entered the decree.") However, the
6 Nevada Supreme Court is the highest court with respect to issues of purely Nevada state law.
7 *Danforth v. Minnesota*, 552 U.S. 264, 291–92, (2008) ("State courts are the final arbiters of
8 their own state law; this Court is the final arbiter of federal law.").

9 These are important issues of state law that are far from settled. If this Court accepted
10 Mineral County's myopic version of the public trust doctrine, the balancing required by the
11 public trust doctrine would be lost and Nevada water law would be thrown into chaos. See,
12 *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 728 (Cal. 1983) ("As a matter of
13 practical necessity the state may have to approve appropriations despite foreseeable harm to
14 public trust uses.").

15 NDOW agrees with Mineral County to the extent that certification of questions
16 concerning the public trust to the Nevada Supreme Court is the only way for this Court to
17 obtain a definitive answer concerning the nature and extent of the public trust doctrine in the
18 instant case. Once the questions are answered, this Court should decide the impact of those
19 answers upon its jurisdiction over the decreed waters.

20 **IV. CONCLUSION**

21 The claims against individual groundwater users must be dismissed as they are not
22 proper parties to the decree and the water rights held by them are under the jurisdiction of the
23 State Engineer and the state courts. Mineral County's arguments concerning the nature and
24 extent of the public trust doctrine in Nevada are incorrect and this court should consider
25 certification of the questions concerning the public trust doctrine to the Nevada Supreme
26 Court.

27 ///

28 ///

Respectfully submitted this 30th day of June, 2014.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Bryan L. Stockton
BRYAN L. STOCKTON
Senior Deputy Attorney General
Nevada State Bar #4764
100 N. Carson Street
Carson City, Nevada 89701
775-684-1228 Telephone
775-684-1103 Facsimile
bstockton@ag.nv.gov
*Attorneys for Nevada Department
of Wildlife*

CERTIFICATE OF SERVICE

I, Sandra Geyer hereby certify that on this 30th day of June, 2014, I electronically filed the foregoing REPLY IN SUPPORT OF MOTION TO DISMISS CONCERNING THRESHOLD JURISDICTIONAL ISSUES with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses that are registered for this case; and I further certify that I served a copy of the foregoing to the following non CM/EFC participants by U.S. Mail, postage prepaid, this 30th day of June, 2014:

Athena Brown, Superintendent
Western Nevada Agency
Bureau of Indian Affairs
311 E. Washington Street
Carson City, Nevada 89701-4065

State Engineer, Division of Water
Resources
State of Nevada
901 S. Stewart Street, Suite 202
Carson City, Nevada 89701

Leo Drozdoff
Department of Conservation & Natural Resources
State of Nevada
901 S. Stewart Street, Suite 1003
Carson City, Nevada 89701

William J. Shaw
Brooke & Shaw, Ltd.
P.O. Box 2860
Minden, Nevada 89423

George M. Keele, Esq.
1692 County Road, Suite A
Minden, Nevada 89423